UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

ART, LLC and UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case 18-CA-168725
GLEN LAKE'S MARKET, LLC and UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case 18-CA-168726
THOMAS B. WARTMAN and UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case 18-CA-168727
THOMAS W. WARTMAN and UNITED FOOD & COMMERCIAL WORKERS, LOCAL 653	Case 18-CA-168728
VICTORIA'S MARKET, LLC and UNITED FOOD & COMMERCIAL WORKERS LOCAL 653	Case 18-CA-168729

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INTRODUCTION

Respondents respectfully submit the following reply brief in support of their exceptions. The critical difference between the parties' exceptions is obvious. Respondents focus on legal issues, backed by citation to precedent applicable to the ALJ's own legal and factual conclusions, while the General Counsel and the Union quarrel with the factual findings of the ALJ, even though all factual issues must be resolved in Respondent's favor. In this brief, Respondents argue four crucial points:

- The ALJ ruled upon issues raised by Respondents from the outset, including the fact that Respondents are not employers within the meaning of the Act. Hence, Respondents waived no argument.

- Only employers can commit an unfair labor violation. This obvious legal conclusion, drawn from the plain language of the Act, precludes the ALJ and the Board from imposing any remedial measures against Mr. Wartman, Tommy, and ART, LLC.

- At this late stage, neither General Counsel nor the Union appreciates the implications of this matter's procedural posture. Respondents did not need to prove their case. Instead, General Counsel and the Union bore the burden of proof.

- Respondents' secondary state law claims had an adequate basis and, in any event, not even the ALJ found that the entire lawsuit was objectively baseless.

Each of those four issues are addressed, in turn, below. Respondents thus ask that the Board reverse the ALJ's findings as identified in Respondents' exceptions.

ARGUMENT

I. RESPONDENTS DID NOT WAIVE ANY ARGUMENTS THEY ADVANCED IN THEIR POST-HEARING BRIEFS.

Respondents fully raised all disputed issues before the ALJ in their initial pleadings, during the evidence presented, at trial, and in their post hearing briefs. Specifically, Respondents preserved their right to argue the following: (1) Mr. Wartman, Tommy, and ART, LLC were not employers under the Act and thus could not be held liable for a labor law violation; (2)

defamation can supply the predicate conduct for a tortious interference claim in the labor context; and (3) the Union's conduct was more than sufficient to support a claim for tortious interference without preemption by the Act. In essence, General Counsel and the Union seek to avoid explanations for baseline legal contentions that are beyond good faith contest.

A. Respondents Consistently Stated Mr. Wartman, Tommy, and ART, LLC are not Employers Under the Act.

Since their Answer, Respondents have stated that Mr. Wartman, Tommy, and ART, LLC were not liable under the Act because they were not statutory employers. Respondents' Answer to the Complaint explicitly denied employer status for these three parties and further denied any agency. GC Exhibit 1(n) at ¶¶ 2(k)–(m). These denials stand in stark contrast against Respondents' admissions that the new stores were employers. *Id.* at ¶¶ 2(g)–(h). Respondents also argued in summary judgment that Mr. Wartman, Tommy, and ART, LLC (among other entities) could not be liable under the Act. Further, during the hearing, Respondents made significant efforts to distance Mr. Wartman, Tommy, and ART, LLC from the new stores, demonstrating the legal separation between these parties and the new stores, as well as the distinction between the new stores and Fresh Seasons Markets. Respondents also urged the ALJ to find that Mr. Wartman, Tommy, and ART, LLC were not liable under the act in their post-hearing brief. Given the lack of discovery in the underlying action, there is literally nothing else Respondents could have done to raise this issue.

Indeed, the ALJ agreed with Respondents' position that Mr. Wartman, Tommy, and ART, LLC, were not employers. According to the ALJ, this was not even a close call—the ALJ found that General Counsel and the Union had utterly failed to address this issue during the hearing or in their briefs, even though it was their burden to prove their case. ALJD 28:n.48. General Counsel and the Union do not dispute this finding. In fact, both General Counsel and the Union

effectively agreed that these three could not be employers under the Act when they failed to make an exception to this finding. Board Rules § 102.46(b)(2) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived."). Respondents were thus not raising a new argument in their exceptions, but instead reinforced their position based on an unequivocal finding by the ALJ.

The cases relied upon by General Counsel and the Union regarding waiver are inapplicable. In *Conditioned Air Systems*, the Board rejected respondent's attempt to argue a letter of assent was ambiguous, that unusual circumstances merited withdrawal, and that the union was acting in bad faith by making an information request. 360 NLRB 789, 789 n. 3 (2014). None of these issues had been raised at any point before respondent filed its exceptions. *Id.* In *Ozark Constructors, LLC*, the Board rejected an argument raised for the first time in the exceptions, that an employee had exceeded his CBA obligations by reporting a safety incident and the person responsible. 355 NLRB 145, 145 (2010). The Board in *Smoke House Restaurant* rejected respondents' attempt to redefine the objective of a union's picketing activity, despite having failed to raise those issues at hearing. 347 NLRB 192, 195 (2006). Respondent in *Yorkaire, Inc.* failed to argue its relationship with the union was governed by Section 8(f) of the Act, as opposed to Section 9(a), as the ALJ found. 297 NLRB 401, 401 (1989). All of these cases share a common theme—parties raised entirely new arguments and issues that had never been addressed before a party filed its exceptions. Further, all of these cases are distinguishable in that the parties did not rely upon an ALJ's conclusion in response to an existing argument, as Respondents have done here.

Unlike those cases, Respondents are not raising a new issue. Instead, Respondents have consistently taken the position that Mr. Wartman, Tommy and ART, LLC were not statutory

employers since they first filed their Answer; Respondents' reliance on the ALJ's decision does not somehow create a new argument or issue. As explained in Section II, *infra*, it is axiomatic that employer status is a necessary predicate for liability under the Act. General Counsel and the Union's arguments concerning waiver are thus an attempt to cover for their own failure to address this issue at the hearing or in their briefing, an error that was compounded by similarly failing to address this issue in their exceptions.

B. Respondents Timely Raised the Argument that Defamation Could Serve as the Basis for a Tortious Interference Claim.

The Union argues that Respondents waived the right to claim that defamation could serve as a basis for a tortious interference claim, claiming Respondents did not raise this in their brief. Union's Br. Oppos. Except. 5. There is no good faith basis for this argument.

Throughout the hearing, Respondents presented significant evidence of the false statements that the Union used to tortiously interfere with the business at the new stores, including the Complaint and Amended Complaint submitted in the Lawsuit below. Joint Exs. M, N; Resp. Exs. 47, 49, 50, 52, 53; Tr. 267, 361–63, 429. Respondents also introduced into evidence a brief in which Respondents made the exact same argument the Union now argues Respondents waived. Resp. Ex. 57 at 30 ("Hence, actionable defamation may serve as the predicate conduct for claims of tortious interference with business relations or tortious interference with prospective economic advantage."). In their post-hearing brief, Respondents even pointed out that "counsel for the Union acknowledged that a defamation claim could serve as a predicate for a tortious interference claim." Resp. Post-Hearing Br. 22. In their post-hearing brief, Respondents also cited a case for the proposition that a tortious interference claim could proceed based on false statements made with actual malice. *Id.* 42 (citing *Grayhawk, LLC v. Ind. /Ky. Reg'l Council, Local Union No. 64*, No. 3:07-CV-272-S, 2009 U. S. Dist. LEXIS 118121, at

* 10 (W.D. Ky. Dec. 17, 2009)).

The Union's argument regarding waiver on this issue is thus utterly unfounded.

C. Throughout this Matter, Respondents Argued the Union's Conduct was Sufficient to Support a Claim for Tortious Interference.

General Counsel and the Union also argue that Respondents somehow waived any argument that the Union's conduct was sufficiently tortious to survive preemption under the Act. At the hearing, however, Respondents introduced substantial testimony that the Union engaged in coercive conduct above and beyond the defamatory conduct mentioned above. Tr. 359, 428. Respondents then argued in their post-hearing brief that the Union's actions were improper. Resp. Post-Hearing Br. 41. Respondents' argument is, and always has been, that the Union's conduct at the new stores was sufficient to support a claim for tortious interference. This included picketing, accosting patrons, preventing suppliers from unloading, taking pictures of people in their cars, and the defamatory statements linking the new stores to Fresh Seasons Markets. Respondents thus raised no issues or facts in their exceptions that were not already fully presented and argued before the arbitrator. *See, e.g. Yorkaire, Inc.* 297 NLRB at 401 (party cannot raise new issues in its brief on exceptions). General Counsel and the Union stretch the waiver doctrine beyond any reasonable limits in an unequivocal attempt to avoid the lack of authority for their position and a legal standard that is incredibly favorable to Respondents.

II. NON-EMPLOYERS CANNOT BE HELD LIABLE UNDER THE ACT FOR UNFAIR LABOR PRACTICES.

The Act is clear—only employers can commit an unfair labor practice. 29 U.S.C. § 158(8)(a)(1). This very simple proposition was enforced in *Arkansas Lighthouse for the Blind v. NLRB*, where the Eighth Circuit rejected remedial measures directed at an entity it determined could not be an employer under the Act. 851 F.2d 180, 183-85 (8th Cir. 1988). General Counsel and the Union criticize Respondents for only citing this case for this issue, even though they

similarly rely on only one case in response. In the process, they further ignore the ALJ's finding that they presented no evidence or argument on the issue, even though they bore the burden of proof.

Respondents suggest there is little case law on this issue because charging parties and General Counsel rarely attempt the untenable argument that non-employers can commit an unfair labor violation under the Act. Moreover, *Manno Electric* has no relevance to this matter and is instantly distinguishable. Simply put, there is no language in *Manno Electric* that states someone may be held liable under the Act if that person or party is not an employer or an agent of an employer. *See generally* 321 NLRB 278 (1996). The ALJ and the Board both obviously believed that Manno was an agent of the employer, Manno Electric. *Id.* at 295. ("Manno and Manno Electric . . . were acting together and for each other."). Respondents do not dispute that individuals can be liable under the Act if they are agents for the employer, yet that is exactly what General Counsel and the Union failed to prove at the hearing.

Here, since their very first filing in this matter, Respondents have vigorously disputed that Mr. Wartman, Tommy, and ART, LLC were either employers under the Act or agents for the new stores. General Counsel and the Union should not be allowed to make an end run around their failure to present evidence and argument on this crucial point, as well as their failure to timely raise an exception to this finding, by making an unsupported argument that is contrary to the plain language of the Act, case law, and common sense.

III. GENERAL COUNSEL AND THE UNION CONTINUE TO MISREPRESENT THE RELEVANT LEGAL STANDARD.

General Counsel and the Union continue to either ignore or blatantly misstate the relevant legal standard. Respondents incorporate the correct legal standard, as stated in their previous briefing submitted to this Board. Based on this legal standard, it is clear that Respondents had a

sufficient factual and legal basis for their state law claims since (1) Respondents demonstrated sufficient conduct to meet the standard of showing tortious interference in the context of a labor dispute; (2) Respondents offered sufficient evidence to show that they would be able to establish their claim for tortious interference according to Minnesota case law; and (3) Respondents established they would be able to prove damage to reputation and actual damages in support of their defamation claims.

A. Respondents Introduced Sufficient Evidence to Support a Claim for Tortious Interference in the Context of a Labor Dispute.

Respondents incorporate their argument and record citations previously submitted in support of their exceptions regarding their tortious interference claim. Respondents only reply to make clear that General Counsel and the Union still fail to understand the appropriate standard. For example, General Counsel argues that Respondent did not cite any cases directly on point, ignoring the fact that Respondent did cite a case that directly supports their claim. *See Grinnell Fire Prot. Sys. Co.*, 328 NLRB 585, 603–04 (1999). Taking a slightly different approach, the Union attempts to distinguish the facts of Respondents' cases.[1] Of course, Respondents did not need to cite cases that were precisely on point with the underlying facts and were even allowed "some tacking into the wind of adverse precedent." *Children's Hosp. Med. Ctr. of N. Cal.*, 351 N.L.R.B. 569, 571 (2007). Neither distinguish the facts of applicable case law (the Union's approach) nor ignoring the case law altogether (General Counsel's approach), are substitutes for showing that the claims lacked objective basis.

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[1] The Union also argues that the conduct alleged as part of Respondents' tortious interference claim is the same conduct as that alleged in Respondents' LMRA claim. It is entirely possible, however, that conduct constituting a violation of the LMRA may also arise to the severity sufficient to support a tortious interference claim in a labor dispute. *See Grinnell Fire Prot. Sys. Co.*, 328 NLRB at 603–04 (allowing a tortious interference claim to survive alongside LMRA claim based on conduct that occurred on the picket line).

General Counsel also argues Respondents' evidence in support of this claim was "far too vague and conclusory to establish violence." Apparently, General Counsel still fails to recognize that Respondents did not need to "establish" anything. Rather, it was *General Counsel's* burden to prove that Respondents "did not have and could not reasonably have believed [they] could acquire through discovery or other means evidence needed to prove essential elements of its causes of action." *Milum Textile Servs. Co.*, 357 NLRB 2047, 2053 (2011).

B. Respondents Established Damages for Their Tortious Interference Claim.

In relation to Respondents' potential damages for tortious interference, General Counsel faults Respondents for not detailing their discovery strategy for their state law claims. There is absolutely no basis in the case law for this requirement and General Counsel's failure to cite a single Board decision in support of this argument is telling.

Moreover, as explained in detail in Respondents' briefing, Respondents provided significant evidence that demonstrated specific third parties ceased doing business with the new stores based on the Union's tortious conduct. Nonetheless, General Counsel argues Respondents misplaced the burden on General Counsel and even argues that Respondents needed to do more than show they could eventually prove their claims in discovery. Similarly, the Union argues that "[i]t makes no sense for Respondents to argue that discovery is necessary to identify entities with whom it expected to do business." Both of these statements are blatant misstatements of the legal standard as it applies to Respondents' burden. To the extent Respondents had to show *anything*, they only needed to show that they could prove their claims with discovery. *See id.*

General Counsel further argues that it "sufficiently demonstrated" at the hearing that Respondent could not acquire evidence to prove their claims. Of course, General Counsel never introduced evidence that showed the Union's conduct did not prevent business between third parties and the new stores and this precise issue certainly does not appear in the cited pages of

General Counsel's brief. Yet, even if General Counsel had raised factual disputes about Respondents' damages (something Respondents dispute), all factual disputes are to be construed in Respondents' favor. *Ray Angelini, Inc.*, 351 NLRB 206, 208 (2007).

C. The Union and General Counsel Misstate the Holding of *Linn* as it Relates to Defamation Claims Brought in the Context of a Labor Dispute.

While Respondents cited the relevant language in their initial brief, it bears repeating since General Counsel and the Union still fail to understand *Linn's* holding as it relates to damages in a defamation case in this context:

> As we have pointed out, certain language characteristic of labor disputes may be held actionable *per se* in some state courts. . . . We therefore hold that a complainant may not recover except upon proof of such harm, ***which may include general injury to reputation, consequent mental suffering, alienation of associates***, specific items of pecuniary loss, ***or whatever form of harm would be recognized by state tort law***.

Linn v. United Plant Guard Workers, 383 U.S. 53, 65 (1966) (emphasis added). As explained in detail throughout Respondents' brief in support of exceptions, Respondents offered a panoply of evidence to support damages of the type recognized by *Linn.*

IV. THE STATE LAW CLAIMS ARE INSUFFICIENT TO SUPPORT A FINDING OF UNFAIR LABOR PRACTICES.

Despite their best attempts, General Counsel and the Union fail to explain why the ALJ's finding of an unfair labor practice could be premised upon secondary state law claims after *NLRB v. Allied Mechanical* 734 F.3d 486 (6th Cir. 2013). This case fully supports Respondents' exception because it involved secondary claims, which the Board found constituted separate violations of the Act. *Id.* 489, 492–93. This case did not revolve on whether the underlying claims were objectively baseless, only that their inclusion was not enough to render an entire lawsuit objectively baseless. Thus, the Union's "critical distinction" involving preemption is really a distinction without a difference. Notably, neither General Counsel nor the Union argued

that the state law claims were anything but secondary to the federal claims in the Lawsuit. Thus, pursuant to *Allied Mechanical*, the ALJ erred by holding that Respondents had committed an unfair labor violation by including claims that apparently all parties agree were an insignificant part of the Lawsuit.

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